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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ORACLE USA, INC., a Colorado corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation,

Plaintiffs,

v.

RIMINI STREET, INC. , a Nevada corporation; SETH RAVIN, an individual,

Defendants.

Case No. 2:10-cv-0106-LRH-PAL

DEFENDANT RIMINI STREET, INC.'S MEMORANDUM AND POINTS OF AUTHORITY IN OPPOSITION TO ORACLE'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

[REDACTED]

Date: _____, 2012
Time:
Place: Courtroom __
Judge: Hon. Larry R. Hicks

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Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant Rimini Street, Inc. ("Rimini") submits the following memorandum and points of authority in opposition to the second motion for partial summary judgment filed by Plaintiffs Oracle USA, Inc., Oracle America, Inc., and Oracle International Corp. (collectively, "Oracle") (Dkt. 405).

I. INTRODUCTION

In Rimini's Opposition to Oracle's first motion for partial summary judgment, Rimini established that Oracle's infringement theories rest on implausible interpretations of the relevant licenses. Oracle's interpretations ignore key rights granted to the licensees, including express provisions permitting copying of the software and allowing third party service providers (such as Rimini) to access, modify and use the software in support of licensees. Oracle's second motion continues this pattern of turning a blind eye to critical license provisions and ignoring the substantial evidence that supports Rimini's claims and defenses in this matter. Oracle's second motion for partial summary judgment should be denied.

Oracle now moves for partial summary judgment for copyright infringement concerning Oracle's Relational Database Management Software ("Oracle Database"), as well as Rimini's license defense as to Oracle Database. Oracle's motion lacks merit as two distinct sets of licenses authorize Rimini's actions.

First, Rimini relies on Oracle's Developer License for its uses of the Oracle Database to develop updates for Oracle's software applications. The Developer License expressly permits use of Oracle Database for "developing, testing, prototyping and demonstrating your application . . . ." While Oracle argues the Developer License may not be used to develop software that is ultimately commercialized, the actual license agreement contains no such restrictions. In fact, the very sentence Oracle cites as containing the "commercial-use restriction" unambiguously includes an exception permitting use of the database for "development of . . . your application."

Second, Rimini relies on its clients' database licenses with Oracle to makes copies of Oracle Database. As explained in Rimini's Opposition to Oracle's first motion for partial summary judgment, Rimini follows the industry practice of installing non-production instances of its clients'

software environments (including Oracle Database) for use when providing support services. Oracle's standard database license permits [redacted] Applying these license provisions, Rimini's installation and use of Oracle Database is fully authorized by its clients' licenses with Oracle, and Oracle is not entitled to judgment on its claims concerning Oracle Database.

Oracle also moves for judgment as to Rimini's eighth and ninth affirmative defenses of laches and statute of limitations, arguing there is no evidence Oracle had notice of the alleged infringement before January 25, 2007. In reality, there is ample evidence that Oracle knew—or, at least, should have known—of the alleged acts of infringement well before January 25, 2007.

For instance, Oracle, through its predecessor Siebel Systems Inc. ("Siebel"), raised the very issues underlying this action on September 26, 2005. In a letter to Rimini, Siebel's Director of Legal Affairs asserted: [redacted] Rimini promptly responded to Oracle's letter on October 6, 2005 by articulating the same positions it now advances in this action, namely that Rimini's services [redacted] Oracle did not further press its positions, and Rimini launched its service shortly thereafter in late 2005. Since that time, Rimini has openly obtained, accessed, installed, and updated Oracle software for its licensed clients. Because Oracle was well aware of this allegedly infringing conduct but unreasonably delayed in bringing the present suit, Oracle's claims are untimely, and Oracle is not entitled to judgment as to Rimini's eighth and ninth affirmative defenses.

Finally, Oracle moves for summary judgment as to Rimini's counterclaims, which address false and defamatory statements by Oracle to the press and a Rimini customer. Oracle first argues Rimini is a limited purpose public figure and therefore must prove the defamatory statements were made with actual malice. Oracle is wrong. Rimini's business methods were not a matter of public

controversy until Oracle filed this suit, and Rimini's sporadic public statements are not evidence of Rimini thrusting itself into the public eye, as Oracle suggests.

And even if Rimini were a limited purpose public figure, there is substantial evidence that Oracle's statements were made with actual malice. During the course of discovery, Rimini requested, and Oracle produced, discovery firmly establishing that Oracle knew: (1) every Rimini client is licensed by Oracle to the software products supported by Rimini; (2) Oracle's licenses authorize third-party vendors (such as Rimini) to possess and work with the licensed products; and (3) Oracle knowingly sent Rimini hundreds of copies of Oracle software. Given Oracle's own conduct, it is clear that Rimini did not "steal" any software, and a reasonable jury could find that Oracle's defamatory "massive theft" allegations were made maliciously. Rimini is entitled to present its counterclaims to the jury.

II. FACTUAL BACKGROUND

A. Facts Related to Oracle Database.

Oracle Database is a popular database tool used by certain Rimini customers along with their enterprise software platforms. Oracle Database provides a foundation for the enterprise software that manages various aspects of a business, such as supply chain, payroll or financial software platforms. To implement such platforms, the database is combined with applications, such as Oracle's PeopleSoft, J.D. Edwards and Siebel products, to form a complete software environment capable of managing information across the entire enterprise. Dkt. 418, Statement of Undisputed Facts in Support of Oracle's Second Motion for Partial Summary Judgment (L.R. 56-1) ("Oracle SUF") 8.

Oracle authorizes use of Oracle Database under two different licenses. The first license, known as a "Developer License," is provided free of charge to software developers[1] to facilitate

[1] It is common in the computer industry for software vendors to make software available to developers at little or no cost for purposes of development. Examples of common developer networks can be found in Microsoft's development community MSDN, Apple's iOS and Mac Developer Programs, and Google's Android Developers. *See* Microsoft Developer Network, http://msdn.microsoft.com (last visited Oct. 9, 2012); Apple Developer, https://developer.apple.com, (last visited Oct. 9, 2012); Android Developers, http://developer.android.com/index.html (last visited Oct. 9, 2012).

development of software applications that run in connection with Oracle Database. Rimini's Statement of Facts In Support of its Opposition to Oracle's Second Motion for Partial Summary Judgment and Response to Oracle's Alleged Facts (L.R. 56-1) ("SOF") 1. The Developer License permits use of Oracle Database for "developing, testing, prototyping and demonstrating your application" but disallows use of Oracle Database for "internal data processing or for any commercial or production purposes . . . except the development of your application." SOF 2. Further, the license prohibits continued development of an application after the application is used for "internal data processing, commercial or production purpose without securing" an additional license. SOF 3.

Oracle also licenses Oracle Database under the Oracle License and Service Agreement ("OLSA"). SOF 4. The OLSA provides licensees a limited right to use Oracle Database [redacted] The parties have stipulated that the terms of the standard form OLSA's from 2002 to 2012 are representative of the actual licenses Oracle granted for Oracle Database, including the database licenses granted to Rimini's clients. Dkt. 236 at ¶¶ 4-6.

Because certain Rimini clients use Oracle Database as part of their software environments, Rimini creates instances of Oracle Database to support these clients. SOF 7; Dkt. 418 at 7-8 (Oracle SUF 9). [redacted] As detailed in Rimini's Opposition to Oracle's first motion for partial summary judgment, the creation of non-production environments for support purposes is a widely accepted practice in the industry and is encouraged by Oracle's own technical recommendations. SOF 9. Further, it is common in the industry for third-party support

vendors to maintain a copy of a client's software environment, including an instance of the client's database, for support purposes. SOF 10.

Generally speaking, Rimini uses Oracle Database to support licensed clients in two different ways. First, Rimini uses Oracle Database for [redacted]

To create updates for the software it supports, Rimini employs a team of full-time software developers. SOF 13. These developers use [redacted] While Oracle incorrectly states that Rimini saves research and development costs by copying Oracle software (Plt. Br. at 4), Rimini prides itself in the quality of the updates created by its dedicated development team, and Rimini routinely delivers its updates to clients ahead of Oracle's delivery date for equivalent updates. Dkt. 407, Pradhan Decl. ¶ 103 & Dkt. 415, Oracle Ex. 96 at 5-6.

In addition to development work, Rimini also uses Oracle Database to address technical support issues unique to a particular client. To address such technical issues, Rimini offers "break/fix" support and [redacted]

[redacted]

B. Facts Related to Rimini's Laches and Estoppel Defenses.

Rimini was founded in September of 2005. Before Rimini even signed its first customer, in-house counsel for Oracle's predecessor, Siebel, sent Rimini a letter addressing Rimini's [redacted]

Rimini responded on October 6, 2005, confirming that it indeed required access to copies of its clients' software for [redacted]

Instead of taking Rimini up on its offer, Oracle stated that it had "no obligation" to inform Rimini of "what it must do to avoid engaging in unlawful conduct." SOF 21.

Following the parties' exchange of letters, Rimini continued to grow its support business in late 2005 and in 2006. During this time period, Rimini began requesting that Oracle directly ship

copies of its installation media to Rimini's address, and the evidence shows that [redacted] Despite such knowledge, Oracle continued sending Rimini media for years, discontinuing this practice only months before bringing the present suit. *Id.*

C. Facts Related to Rimini's Defamation Counterclaims.

Oracle filed its complaint against Rimini on January 25, 2010. Oracle SUF 57. In its complaint, Oracle made several inflammatory and hyperbolic statements regarding Rimini, including that Rimini was carrying out a "corrupt" and "illegal business model." Dkt. 1, at 2, 5. Following the lead of Oracle's complaint, Oracle employees further communicated Oracle's baseless allegations to members of the media and a Rimini customer. SOF 24-25. For example, Oracle's spokesperson, Ms. Deborah Hellinger, responded to press inquiries stating that Oracle "draws the line with any company, big or small, that steals its intellectual property. The massive theft that Rimini and Mr. Ravin engaged in is not healthy competition." SOF 24. Ms. Hellinger, in her capacity as Senior Director of Corporate Communications, sent this statement to at least two separate news services. *Id.*

In its initial Answer, Rimini noted that it "expect[ed] discovery to illuminate a pattern of similar defamatory communications by Oracle representatives." *See* Dkt. 30 at 11. Indeed, when Rimini propounded its discovery requests, additional defamation by Oracle was revealed. For instances, James McLeod, an Oracle Regional Services Sales Manager, distributed an article containing defamatory statements to a Rimini customer, in an apparent attempt to secure that customer's return to Oracle support. SOF 25. That article stated that Oracle sued Rimini Street for "massive theft," but fails to mention Oracle's copyright infringement claims or any of the other causes actually pled by Oracle. *Id.*[2]

[2] In its motion, Oracle discusses three defamatory statements it made regarding Rimini, including statements made to Pat Phelan. After conducting discovery, Rimini has elected not to rely on the statements made to Ms. Phelan as a basis of its counterclaims.

III. LEGAL STANDARDS

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Bally Techs., Inc. v. Bus. Intelligence Sys. Solutions, Inc.*, No. 2:10-CV-00440-PMP-GWF, 2012 U.S. Dist. LEXIS 120340, at *8-*9 (D. Nev. Aug. 23, 2012). A genuine issue of fact exists if, based on the evidence, "a reasonable fact finder could find for the non-moving party." *Bally Techs., Inc.*, 2012 U.S. Dist. LEXIS 120340, at *8. The Court should view "all evidence in the light most favorable to the non-moving party." *Id.* at *9.

IV. RIMINI'S USE OF ORACLE DATABASE IS PERMITTED BY EXPRESS LICENSE PROVISIONS.

Two distinct licenses authorize the actions Rimini undertakes with respect to Oracle Database. First, Oracle's Developer License expressly permits use of the database for development of application software and, thus, authorizes Rimini's development work. Second, Oracle's License and Service Agreements ("OLSAs") authorize the support activities Rimini undertakes using Oracle Database, including Rimini's creation of database copies on its clients' behalf. In its brief, Oracle misconstrues the scope of these licenses and fails to establish actions by Rimini that exceed the conduct authorized by their combination. *See Netbula, LLC v. BindView Dev. Corp.*, 516 F. Supp. 2d 1137, 1151 (N.D. Cal. 2007) ("Where, the existence of a license is not in dispute, and only the scope of the license is at issue, the copyright owner bears the burden of proving that the defendant's copying was unauthorized." (citing *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995)). At the very least, summary judgment is inappropriate given genuine issues of material fact surrounding whether Rimini's actions fall within the scope of Oracle's licenses. *Allman v. Capricorn Records*, 42 Fed. Appx. 82, 83 (9th Cir. 2002) (reversing a grant of summary judgment because "genuine issues of fact remain for resolution to the scope of the license and whether the defendants exceeded the scope and thus infringed the copyright.").

A. The Developer License Authorizes Rimini's Use of Oracle Database for Development Work.

The Developer License expressly permits use of Oracle Database for "developing, testing, prototyping and demonstrating your application . . . ." SOF 2. While Oracle suggests this authorized development is limited to "initial" stages of development, the license, in reality, contains no such restrictions. SOF 3. Rather, the license allows development until the application is used commercially, prohibiting continued development "after . . . you have used [the application] for any internal data processing, commercial or production purpose[ ] . . . ." SOF 3. As explained *infra*, the evidence establishes that Rimini's development work complies with these express license provisions. SOF 11 - 15.

1. The Developer License Does Not Prohibit Development Work by Commercial Enterprises.

Oracle contends that Rimini's use of Oracle Database falls outside the scope of the Developer License because Rimini is a "commercial enterprise." Plt. Br. at 13. In essence, Oracle argues that the Developer License may not be used to develop software that will ultimately be commercialized. *See id.* The Developer License, however, does not prohibit such use of Oracle Database and, by its express terms, consistently makes clear that development activities are permitted, including commercial development.

Specifically, the purported commercial-use restriction cited by Oracle unambiguously includes an exception permitting use of the database for "development of . . . your application." SOF 2; Dkt. 407, Pradhan Decl. ¶ 7 & Dkt. 411, Plt. Ex. 5 ("You may not: - use the programs for your own internal data processing or for any commercial or production purposes, or use the programs for any purpose *except the development of your application.*"). Further, the license explicitly contemplates commercialization of the developed software, disallowing continued reliance on the Developer License "after . . . you have used [the application] for any commercial purpose . . ." SOF 3. As Oracle's corporate representative explained, [redacted]

[redacted] Indeed, software development is a commercial activity, and [redacted] Dkt. 407, Pradhan Decl. ¶ 18 & Dkt. 419, Plt. Ex. 16 (Seth Ravin Depo. (Nov. 17-18, 2011)) at 447:22-448:5. Tellingly, even Oracle tacitly admits that commercial development work is permitted under the Developer License, stating that the license "precludes the free use of Oracle database 'for any commercial purpose' *beyond* that initial development." Plt. Br. at 13 (emphasis added). Consistent with this comment, Rimini relies on the Developer License to authorize its use of Oracle Database for development, not "'for any commercial purpose' beyond" development.[3]

2. Rimini's Development of Application Software for its Clients Falls Within the Scope of the Developer License.

Oracle also argues that Rimini's development is not authorized by the Developer License because such development is not of "your application." Plt. Br. at 14-15. First, Oracle argues the term "application," as used in the Developer License, does not encompass the software updates developed by Rimini. Second, Oracle argues the updates cannot be considered *Rimini's* because they are "'derivative works' of Oracle's property.'" *Id.* at 14-15. In making these arguments, Oracle seeks to impermissibly deviate from the plain and ordinary reading of the license's text. As Oracle states in its brief, "the Court should interpret the terms in those licenses 'based on their ordinary and popular sense, unless a technical sense or special meaning is given to them by their usage.'" *Id.* at 12 (quoting *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 563 F.3d 777, 783 (9th Cir. 2009)). When properly ascribed its "ordinary and popular" meaning (or even a technical meaning), the phrase "your application" in the Developer License easily encompasses Rimini's software updates.

[3] Oracle argues Rimini "has admitted" it is obligated to pay for "an appropriate license," citing an internal Rimini email from Chris Limburg. Plt. Br. at 14. Rimini has made no such admission. As explained, there is simply no such commercial-development prohibition in the actual text of the Developer Agreement, and Mr. Limburg's license interpretation, like Oracle's, is critically flawed.

Turning first to Oracle's attempt to distinguish an "application" from an "update," there is ample evidence that Rimini's updates constitute application software that forms a critical portion of applications such as PeopleSoft HRMS, for example. SOF 11-12. Even Oracle's technical expert, Dr. Randall Davis, recognized that [redacted] Reckers Decl. ¶ 12 & Ex. 11 (Expert Report of Randall Davis) at 13. The testimony of Rimini's expert and fact witnesses is in accord. SOF 12. And, while Oracle's motion suggests otherwise (Plt. Br. at 14), Rimini employee George Lester testified unequivocally that Rimini [redacted] in compliance with the terms of the Developer License. SOF 11.

Oracle next argues Rimini's development work is not directed to "*your* application" because Rimini does not own the code underlying its updates. Plt. Br. at 14-15. In making this argument, Oracle contends Rimini's updates are derivative works of Oracle's intellectual property, citing provisions of the Copyright Act. *Id.* The issue, however, does not turn on Rimini's ownership in the alleged "derivative works" under the Copyright Act.

Rather, the critical inquiry is whether the updates are *Rimini's*, when applying a plain and ordinary reading of the license text. *Northrop Grumman Corp.*, 563 F.3d at 783. As to this question, the evidence establishes that the updates-at-issue are indeed *Rimini's* as they are developed by Rimini's own team of full-time software developers. SOF 13. Rimini prides itself in the quality of its updates and the timeliness of their delivery to clients. In fact, Rimini Street routinely delivers its updates to clients ahead of Oracle's delivery date for equivalent updates. Dkt. 407, Pradhan Decl. ¶ 103 & Dkt. 415, Oracle Ex. 96 at 5-6. Such prior delivery removes any doubt that Rimini's updates are developed by Rimini personnel, not copied from Oracle's updates. SOF 13. Further, the updates are maintained solely in Rimini's possession until quality testing is performed for each client. SOF 14. Because the updates: (1) are created by Rimini, (2) differ from the equivalent Oracle updates, and (3) are maintained in Rimini's sole possession (until release to clients), such

updates are easily considered, in an "ordinary or popular sense," *Rimini's* updates. SOF 14; *Northrop Grumman Corp.*, 563 F.3d at 783. At the very least, there is ample evidence from which a reasonable jury could—and should—conclude that Rimini's development of updates constitutes "developing . . . your application," as permitted by the Developer License. *See Allman*, 42 Fed. Appx. at 83 ("genuine issues of fact remain for resolution to the scope of the license and whether the defendants exceeded the scope and thus infringed the copyright.").

B. The OLSA Authorizes Rimini's Copies of Oracle Database and Uses of the Database Beyond Development.

In addition to the discussed uses of Oracle Database for development, Rimini also installs Oracle Database for certain clients to troubleshoot technical issues those clients may experience. SOF 16. These support copies are permitted under the OLSA, which allows [redacted] Applying these express license provisions, it is common in the industry for third-party support vendors to maintain a copy of the client's software environment, including an instance of the clients' database, for support purposes. SOF 10. As such, Rimini's installation and use of support copies of Oracle Database is fully authorized by the OLSAs between Oracle and Rimini's clients.

1. The OLSA is Relevant and Permits Use of the Database by Rimini on Behalf of its Licensed Customers.

Oracle argues that the OLSA is irrelevant because Rimini downloaded the database software from Oracle's websites under the terms of the Developer License. Plt. Br. at 15-16. Oracle's reliance on the *source* of the database software is misplaced and finds no support in the actual text of the OLSAs.

In identifying the relevant OLSAs, Rimini has met its burden of identifying the relevant licenses. *See Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 834 (C.D. Cal. 1998).

Nothing more is required of Rimini as the parties have stipulated that the terms of the form OLSAs are representative of the actual licenses Oracle entered into with its customers for the Oracle Database. Dkt. 236 at ¶¶ 4-6. These licenses uniformly provide non-exclusive rights in the software programs (here, Oracle Database) but **do not require** that the software be obtained from a specific source. SOF 27. As the Supreme Court has observed, software code "is an idea without physical embodiment." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 449 (2007). Consistent with this authority, the rights granted by the OLSAs are not limited to any specific source of the database software, and these licenses cannot be disregarded as Oracle suggests.

2. Rimini's Customers Expressly Authorize Rimini to Obtain and Install the Oracle Database on Their Behalf.

Oracle also argues "there is no evidence that the customers designated Rimini as their [redacted] under the OLSA for purposes of using the Oracle Database." Plt. Br. at 16. In making this argument, Oracle relies heavily on the standard language found in Rimini's support agreement with its customers, stating that such agreements [redacted] In reality, the Rimini support agreements contain no such denial, express or otherwise. SOF 28. To the contrary, the agreements unequivocally [redacted]

[4] "RDBMS" stands for "Relational Database Management Software."

REDACTED IMAGE

Given this unequivocal language in Rimini's service agreements, there is simply no support for Oracle's contention that Rimini is not authorized to obtain copies of Oracle Database on its clients' behalf.[5]

Finally, Oracle attempts to rely on the "Independent Contractor Status" article of Rimini's standard agreement, arguing that

Therefore, the

[5] Nor do the support agreements limit Rimini's database access to "remote access" via the Internet, as Oracle incorrectly argues. SOF 32.

"Independent Contractor Status" article within Rimini's support agreement further confirms that Rimini may rely on the OLSA to authorize its actions with respect to Oracle Database.

3. Rimini's Use of the Oracle Database for Support Activities is Authorized by the OLSA.

Oracle also argues that Rimini's use of the Oracle Database is not authorized by the OLSA because Rimini has "engaged in cross-use of Oracle Database." Plt. Br. at 16. To support this argument, Oracle cites both Rimini's use of the Oracle Database for development and Rimini's installation and use of the database for troubleshooting support issues for clients. *Id.* at 17. As to development, such uses are covered by the Developer License, and, thus, Oracle's discussion of the OLSA is misplaced. With respect to other support uses of the database by Rimini, such uses are solely for the benefit of a particular licensed client. SOF 18. Thus, Rimini's creation and use of Oracle Database is fully authorized by the OLSA.

[redacted]

Such copies of database software in non-production support environments are common in the industry. SOF 9-10.

[redacted]

[redacted] Because Oracle has not established any unauthorized copying or unauthorized "cross-use" of Oracle Database, Oracle is not entitled to summary judgment as to Rimini's license defense.

V. ORACLE'S COPYRIGHT CLAIMS ARE UNTIMELY.

As detailed in Oracle's first motion for partial summary judgment, Oracle's claims in this suit center around allegations that Rimini illegally obtained, accessed, installed, copied, and updated the Oracle software licensed by Rimini's clients. Such claims not only lack merit but are also untimely, as set forth by Rimini's eighth and ninth affirmative defenses of laches and statute of limitations.

A. Legal Standards Governing Laches and Statute of Limitations.

To establish laches in a copyright infringement action, a defendant must show that "(1) the plaintiff delayed in initiating the lawsuit; (2) the delay was unreasonable; and (3) the delay resulted in prejudice." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, No. 10-55834, 2012 U.S. App. LEXIS 18322, *8-*9 (9th Cir. Aug. 29, 2012); *Danjaq LLC v. Sony Corp.*, 263 F. 3d 942, 951 (9th Cir. 2001). Delay is measured from when "the plaintiff knew (or should have known) of the allegedly infringing conduct, until the initiation of the lawsuit." *Danjaq*, 263 F. 3d at 952. In determining the reasonableness of the delay, courts look at the *cause* of the delay. *Id.* at 954. Permissible causes for delay include "exhaustion of remedies through the administrative process," evaluation of "complicated claims," and determining "whether the scope of proposed infringement will justify the cost of litigation." *Id.* at 954-955. Prejudice exists where "during the delay, [defendant] invested

money to expand its business or entered into business transactions based on [its] presumed rights." *Petrella*, 2012 U.S. App. LEXIS 18322 at *13.

"Whether a plaintiff's conduct constitutes laches in any given circumstance is an issue of fact." *Id.* at *6. In evaluating laches on a motion for summary judgment, a court must construe all facts in the light most favorable to the defendant, drawing all inferences in its favor. *Danjaq*, 263 F. 3d at 951-952.

As to statute of limitations, copyright actions must be filed "within three years after the claim accrued." *Roley v. New World Pictures*, 19 F.3d 479, 481 (9th Cir. 1994). A copyright claim accrues "when one has knowledge of a violation or is chargeable with such knowledge." *Id.* One is chargeable with knowledge of a violation if it could have reasonably been discovered. *Polar Bear Prods. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004); *see In re Napster, Inc. Copyright Litigation*, 2005 WL 289977, at *4 (N.D. Cal. Feb. 3, 2005) ("A claim for copyright infringement accrues on the date that a reasonable investigation would have put the rights holder on notice that potentially infringing conduct has occurred."); *see also Board of Trustees of Leland v. Roche Molecular*, 487 F. Supp. 2d 1099, 1113 (N.D. Cal. 2009) ("The claimant discovers his cause of action when he becomes aware of facts which would make a reasonably prudent person suspicious that he had been injured."). The date one is chargeable with knowledge of infringement is a question of fact. *Polar Bear*, 384 F.3d at 707.

B. Oracle Knew of the Alleged Infringement in 2005 and 2006.

Oracle's motion for judgment as to Rimini's eighth and ninth affirmative defenses rests on the single erroneous premise that there is no genuine dispute that Oracle lacked notice of Rimini's infringements prior to January 25, 2007. Plt. Br. at 18. In reality, there is ample evidence that Oracle knew—or, at least, should have known—of the alleged acts of infringement well before January 25, 2007.

The evidence in this case establishes that Oracle knew Rimini intended to obtain, access, install, copy, and update Oracle software before Rimini even signed its first client. As previously detailed, Oracle's predecessor, Siebel, first wrote Rimini a letter on September 26, 2005 to address

Rimini's [redacted] Rimini responded on October 6, 2005, confirming that it indeed required access to copies of its clients' software for [redacted] Rimini also advised that it [redacted] Instead of taking Rimini up on its offer, Siebel stated that it had "no obligation" to inform Rimini of "what it must do to avoid engaging in unlawful conduct." SOF 21.

Despite the allegations of unlawful conduct in Oracle's correspondence, Rimini continued to grow its support business in late 2005 and in 2006. During this time period, Rimini began requesting that Oracle directly ship copies of its installation media to Rimini's address, [redacted] Despite such knowledge, Oracle continued sending Rimini media for years, sending literally hundreds (if not thousands) of installation disks to Rimini. *Id.*

Given this evidence, Oracle cannot plausibly claim ignorance of Rimini's allegedly infringing practices. Oracle's motion attempts to dodge this problem by pointing to Rimini's purported "assurances that it was complying with Oracle's intellectual property rights and the terms of applicable licenses." Plt. Br. at 20. But the fact remains that Rimini bluntly told Oracle that it

was entitled to obtain, install, access, update, and copy Oracle software on its clients' behalf.[6] While the parties obviously have different views as to whether such activities comply with "Oracle's intellectual property rights and the terms of applicable licenses," these differing license interpretations do not change the fact that Rimini put Oracle on notice in 2005 of the very practices that now underlie Oracle's claims. *Id.*

Oracle also argues it did not possess certain details of Rimini's practices before discovery in this case. Plt. Br. at 19-20. While Oracle may not have known all the specifics of Rimini's practices in 2007, Oracle unquestionably knew, and is chargeable with knowledge that, Rimini was accessing, copying, and modifying Oracle software, including Rimini's installation of local copies to perform these support tasks. Such activities were set forth in Rimini's 2005 letter to Oracle, and Rimini has never denied such copying of Oracle's software for its clients. SOF 40. Indeed, Rimini's letter explained that its services [redacted] Dkt. 407, Pradhan Decl. ¶ 60 & Dkt. 421, Plt. Ex. 58. As established by Rimini's Opposition to Oracle's first motion for partial summary judgment, the regular way that "other independent consulting services" access Oracle software is by way of local copies of the software maintained on their clients' behalf. SOF 41.

Moreover, it is well-settled that, "if a prudent person would have become suspicious from the knowledge obtained through the initial prudent inquiry and would have investigated further, a plaintiff will be deemed to have knowledge of facts which would have been disclosed in a more extensive investigation." *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 507 F. Supp. 1128, 1135 (D. Nev. 1980); *see Polar Bear Prods. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004). In

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[6] Oracle argues that Rimini has taken a "contrary position" in both denying infringement and arguing that Oracle knew or should have known of the alleged infringement. Plt. Br. at 21, But the fact that Rimini denies liability for copyright infringement does not change the reality that Oracle has been on notice of the facts underlying much of its copyright claims since September of 2005. *Board of Trustees of Leland*, 487 F. Supp. 2d at 1113 ("The claimant discovers his cause of action when he becomes aware of facts which would make a reasonably prudent person suspicious that he had been injured.").

this regard, there is ample evidence that Oracle could have learned more of Rimini's business practices had it investigated further in 2005 or 2006. SOF 20. Notably, Oracle's suspicion of Rimini's activities is apparent from its September 26, 2005 letter, [redacted] SOF 19. Rimini, for its part, has consistently admitted that it obtains, accesses, installs, and updates Oracle software for its clients—not only confirming as much in its responsive letter, but also inviting a dialogue with Oracle as to Rimini's practices. SOF 20; Dkt. 407, Pradhan Decl. ¶ 60 & Dkt. 421, Plt. Ex. 58 (stating that Rimini executives [redacted] *Had* Oracle further investigated, it would have obtained even more facts regarding Rimini's uses of Oracle software. *Id.* While Oracle chose not to further engage Rimini on this subject in 2005, Oracle is still charged with knowledge of the allegedly infringing acts (here, accessing and copying Oracle software) that could have reasonably been discovered. *Polar Bear Prods.*, 384 F.3d at 706. At the very least, when all inferences are drawn in Rimini's favor, there is a genuine issue of material fact surrounding whether Oracle is chargeable with knowledge of the alleged infringement prior to January 25, 2007. *Id.* at 707. Because genuine issues of material fact remain, Oracle's motion for judgment as to Rimini's eighth and ninth affirmative defenses fails. *Danjaq*, 263 F. 3d at 951-952.

VI. ORACLE IS NOT ENTITLED TO JUDGMENT ON RIMINI'S COUNTERCLAIMS

In denying Oracle's motion to dismiss Rimini's counterclaims, this Court found that Rimini sufficiently alleged a claim for defamation based on certain non-privileged statements made by Oracle to members of the press and others. Dkt. 111 at 5-6. The declarations submitted along with Oracle's instant motions now admit that the alleged defamatory statements set forth in Rimini's pleadings were indeed communicated by Oracle employees to both the press and at least one Rimini customer. Dkt. 409, Declaration of Deborah Hellinger In Support Of Oracle's Second Motion for Partial Summary Judgment ("Hellinger Decl.") at ¶¶ 3-4, 6; Dkt. 410, Declaration of James McLeod In Support Of Oracle's Second Motion for Partial Summary Judgment ("McLeod Decl.") at ¶¶ 2-4.

Such statements by Oracle, accusing Rimini of committing "massive theft" and engaging in "an illegal business model," represent a classic case of defamation *per se*, and there is an abundance of admissible evidence supporting Rimini's allegations.

A. Rimini Need Not Prove Actual Malice to Prevail on its Defamation Claim.

Oracle argues that Rimini is a limited purpose public figure because "Rimini frequently makes public comments – including statements to the press – about the legality of third-party support and its own conduct." Plt. Br. at 24. Contrary to Oracle's argument, Rimini is not a limited purpose public figure and need not prove actual malice to prevail on its defamation claim.

To determine whether an individual is a limited purpose public figure:

> First, there must a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants. Second, the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue. In this regard it is sufficient that the plaintiff attempts to thrust him or herself into the public eye. And finally, the alleged defamation must be germane to the plaintiff's participation in the controversy.

Medifast, Inc. v. Minkow, No. 10-CV-382 JLS (BGS), 2011 U.S. Dist. LEXIS 33412, at *14 (S.D. Cal. Mar. 29, 2011) (quoting *Ampex Corp. v. Cargle*, 27 Cal. Rptr. 3d 863, 870 (Cal. Ct. App. 2005)); *see also Bongiovi v. Sullivan*, 138 P.3d 433, 445 (Nev. 2006). Oracle fails to show that Rimini's activities meet this test.

Oracle identifies the existing public controversy as "the legality of third-party support and [Rimini's] own conduct." Plt. Br. at 24. However, there is no apparent public controversy as to the legality of third-party support, as even Oracle concedes that third-party support is permissible. SOF 35. Therefore, the only salient controversy is the legality of Rimini's conduct, a private controversy Oracle itself created by filing the present suit in January 2010.

First and foremost, there is no evidence of a public debate as to the legality of Rimini's conduct when Oracle made its defamatory statements. While these statements were made in January and March 2010, Oracle fails to identify *any* public comments regarding the legality of its support

offerings *for almost two years* between April 25, 2008 and March 29, 2010, the date that Rimini responded to Oracle's original Compliant. SOF 36. And even the communication by Rimini on April 25, 2008 was an isolated comment as Oracle fails to identify any additional comments by Rimini between July 12, 2007 and March 29, 2010. The sporadic comments by Rimini regarding its practices do not support Oracle's argument that there was some public debate raging as to the legality of Rimini's practices.

The infrequent nature of Rimini's comments also demonstrate that Rimini has not "thrust [itself] into the public eye" by undertaking "some voluntary act through which [it] sought to influence resolution of the public issue." *Makaeff v. Trump Univ., LLC*, Case No. 10-CV-940-IEG (WVG), 2010 U.S. Dist. LEXIS 87112, at *13 (S.D. Cal. Aug. 23, 2010). Any review of the communications-at-issue reveal that Rimini's statements were aimed at promoting Rimini's business, not to influence resolution of some broader public issue. For example, the Rimini comment published on April 25, 2008 expressly notes the *lack* of debate regarding the legality of third party support and promotes certain differences between Rimini and one of its former competitors, TomorrowNow. SOF 37. Such comments are clearly not directed to influencing the resolution of some public debate, and courts have explained that "advertising alone does not convert a company into a public figure." *Medifast*, 2011 U.S. Dist. LEXIS 33412, at *23-*24; *see also Vegod Corp. v. American Broadcasting Companies, Inc.*, 603 P.2d 14, 18 (Cal. 1979) ("[W]e conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy." (citations omitted)). Consistent with this authority, Rimini "is not voluntarily injected into a public controversy when" publically promoting its services. *Medifast*, 2011 U.S. Dist. LEXIS 33412, at *25.[7]

[7] Oracle also argues that Rimini is a limited purpose public figure because of its financial and market significance. Plt. Br. at 25, n.8. Oracle cites two cases to support its proposition, both of which are inapplicable. First, Oracle cites *Ampex Corp. v. Cargle*, 27 Cal. Rptr. 3d 863, 870 (Cal. Ct. App. 2005), which held as a limited purpose public figure a corporation with 59,000 publicly-traded shares whose decision to discontinue its multimillion dollar venture was discussed publicly. The corporation in *Ampex* responded to public criticism with press releases and letters posted on its web site. *Id.* at 867. In contrast, Rimini is a small, privately-held company, and Oracle has not put forth evidence that Rimini's business

Finally, Oracle cites comments by Rimini addressing Rimini's response to the allegations made in this lawsuit. Plt. Br. at 24. However, Rimini does not "become a public figure by responding to defamatory statements." *Medifast*, 2011 U.S. Dist. LEXIS 33412, at *25-*26 (citing *Monesian v. McClatchy Newspapers*, 233 Cal. Rptr. 430, 440 (Cal. Ct. App. 1991)). Rimini did not abuse its privilege of reply when it stated and detailed why its business model is entirely legal. Here again, Oracle fails to provide any viable basis for finding that Rimini is a limited purpose public figure, and Rimini need not prove actual malice to prevail on its defamation counterclaim.

B. Rimini Possesses Sufficient Evidence to Prove Oracle Acted Either Negligently or with Actual Malice.

Oracle also argues that Rimini cannot prove Oracle acted with actual malice, or even negligently, because Rimini did not conduct sufficient discovery. Plt. Br. at 24. Oracle is wrong. Notwithstanding the conclusory and self-serving declarations proffered by Oracle, the evidence in this case is more than sufficient to establish that Oracle's defamatory comments were made with "reckless disregard" for the truth.

Oracle's claims of "massive theft" are based on Rimini's possession of Oracle software, as well as Rimini's use of this software to provide support services. Regarding such claims, Rimini's pleadings explain that:

> Oracle cannot truthfully claim that Rimini Street is not authorized to possess copies of Oracle's software. First, every Rimini Street client contract authorizes Rimini Street to possess or access copies of the client's licensed software. Second, as Oracle is well aware, it is common industry practice by other third party consulting venders such as IBM, AT&T, Accenture, Navisite, WTS, CedarCrestone, and virtually every other hosting service provider to possess and work with copies of their client's licensed software products. Third, until recently Oracle itself directly mailed or made available to Rimini Street through authorized downloads, as an authorized agent of Oracle's licensees, copies of the clients' licensed Oracle software.

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methods were discussed publicly or that Rimini responded to those public discussions. Second, Oracle cites *Pegasus v. Reno Newspapers, Inc.* 57 P.3d 82, 92 (Nev. 2002), in which a restaurant was found to be a public figure for the "limited purpose of consumer reporting on their goods and services." While this might be true, Oracle's defamatory statements did not provide consumer reporting about Rimini's services as Oracle has never been a Rimini customer.

Dkt. 30 at 13. Rimini conducted extensive discovery as to the subject matter set forth in its pleading and obtained conclusive evidence demonstrating that: (1) every single Rimini client is licensed by Oracle to the software products supported by Rimini; (2) it is industry practice for third party vendors, including Oracle's own partners, to possess and work with copies of their client's licensed software products; and (3) Oracle knowingly sent Rimini hundreds of copies of Oracle software, [redacted] SOFs 9, 10, 22, 23, 38. Given these facts, a reasonable jury could—and should—find that Oracle's litigation-inspired claims of "massive theft" were made with actual malice.

First, Oracle identified and produced [redacted] SOF 38. As set forth in Rimini's Opposition to Oracle's first motion for partial summary judgment, Oracle's licenses [redacted] Oracle's "massive theft" claim is proven false when considering the language of its own licenses. *Id.*

Second, Rimini conducted extensive discovery into the practices of Oracle's Partners, as well as Oracle's technical recommendations regarding the support of its software. SOF 9. This evidence establishes that Rimini's practices are consistent with the normal practices in the industry, as set forth in Rimini's Opposition to Oracle's first motion for partial summary judgment. SOF 9-10. For instance, numerous Oracle Partners openly advertise the fact that they maintain internal non-production copies their clients' Oracle software, as recommended by Oracle's own technical literature. *See* SOFs 9, 10. Oracle condones (and even recommends) such practices when engaged in by its Partners, but accuses Rimini of being a thief and running an illegal business.[8] Such a blatant contradiction in Oracle's position further proves that Oracle's defamatory comments were indeed made maliciously.

[8] While Oracle recently sued its former partner CedarCrestone for running the same allegedly "illegal business model" as Rimini, Oracle cannot change the fact that its continued to renew its partnership agreement with CedarCrestone despite admitted knowledge of the conduct underlying its recent claims against CedarCrestone. *See* Dkt. 428 at 3, 9.

Third, the discovery in this case further reveals that Rimini was not stealing the Oracle software in its possession—Oracle was knowingly sending it to Rimini. SOF 22-23. Without re-hashing the merits of Rimini's implied license defense, Oracle cannot, on one hand, send Rimini copies of its software and, on the other hand, accuse Rimini of stealing that very software. Given this conduct by Oracle, a reasonable jury could easily conclude that Oracle's "massive theft" allegations were made maliciously.

Far from acting as fraudulent thieves, Rimini Street has acted legally, openly (and often with Oracle's full cooperation), and in accordance with the agreements held by Rimini Street's clients. Ms. Hellinger and Mr. McLeod are Oracle employees that, as part of their job responsibilities, communicate with members of the public on behalf of Oracle regarding, *inter alia*, third party support providers (such as Rimini). SOF 24-25. Courts have held in such circumstances that knowledge of the principal is imputed to its agents. *See Gilbeard v. Dean Witter Reynolds, Inc.*, No. C91-3254 TEH, 199 U.S. Dist. LEXIS 12388, at *12 (N.D. Cal. Aug. 12, 1992) ("Common agency principles hold that knowledge of any agent of a corporation is imputed to the other agents of the corporation and to the principal."); *see also* Cal. Civ. Code § 2332 ("As against a principal, both principal and agent are deemed to have notice of whatever either has notice of . . . ."). As such, Oracle knew or should have known of the falsity of Ms. Hellinger's and Mr. McLeod's statements in light of the discussed evidence, which was known to Oracle at the time the defamatory comments were made. *See Nguyen-Lam v. Cao*, 90 Cal. Rptr. 3d 205, 213-14 (Cal. Ct. App. 2009) (finding evidence of actual malice when the publisher "had never met plaintiff and knew of her only through media reports"). Rimini has more than sufficient evidence to carry its burden at trial as to Oracle's state of mind in making defamatory statements about Rimini.

C. Oracle Has Failed to Establish that its "Massive Theft" Statements are True.

Oracle argues that the defamatory statements made by Ms. Hellinger and Mr. McLeod are true, relying on its first motion for partial summary judgment to prove that Rimini has engaged in "massive theft" of Oracle's intellectual property. Plt. Br. at 26. However, as that motion is still pending, Oracle's present arguments are, at best, premature. Moreover, regardless of whether

Rimini is found to have infringed (which it has not), copyright infringement is not theft. *Dowling v. United States*, 473 U.S. 207, 217 (1985) ("The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use."). At most, Oracle can prove Rimini engaged in copyright infringement. Oracle cannot prove that Rimini engaged in "massive theft" because Oracle did not bring against Rimini an action for, *e.g.*, conversion or misappropriation. Oracle is not entitled to summary judgment on the basis of its truth defense.

D. Mr. McLeod's Email is Not Protected as a Truthful or Fair Report.

Oracle advances two related defenses as to Mr. McLeod's email. First, Oracle alleges the email contained a truthful report that accurately quotes Oracle's complaint. Plt. Br. at 26-27. Second, Oracle contends that the "fair reporting privilege" protects the communication. *Id.* at 28. This Court has already rejected similar arguments in denying Oracle's motion to dismiss. Dkt. 111 at 5-6.

First, Oracle cannot rely on the "truthfulness" of Mr. McLeod's email because "liability for repetition of a libel may not be avoided by the mere expedient of adding the truthful caveat that one heard the statement from somebody else." *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) (internal citations omitted). Indeed, "a defamatory statement is not rendered nondefamatory merely because it relies on another defamatory statement." *Id.* at 1129; *see Frommoethelydo v. Fire Ins. Exch.*, 721 P.2d 41, 46 (Cal. 1986) ("When one person repeats another's defamatory statement, he may be held liable for republishing the same libel or slander."). As the Ninth Circuit recently noted, "[i]t is well established that every repetition of the defamation is a publication in itself, whether or not the person repeating the defamation attributes it to its source." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1104 (9th Cir. 2009) (internal quotation marks omitted); *see also Cianci v. New Times Pub. Co.*, 639 F.2d 54, 60–61 (2d Cir. 1980) (noting the "widely recognized" "black-letter rule that one who republishes a libel is subject to liability just as if he had published it originally, even though he attributes the libelous statement to the original publisher . . . ." (internal quotation marks omitted)).

Thus, Oracle's first argument—that its libelous communication truthfully reported the contents of its Complaint—cannot shield it from liability for defamation under settled law.

Oracle also argues that Mr. McLeod's email is protected by the "fair reporting" privilege because the email includes a "fair and true" news article about this action. Plt. Br. at 28. For the "fair reporting privilege" to apply, both California and Nevada require that the report must be fair, accurate, and impartial. Cal. Civ. Code § 47(d); *Crane v. Arizona Republic*, 972 F.2d 1511, 1519 (9th Cir. 1992) (reversing a grant of summary judgment because a reasonable jury could find the article was not fair and true); *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 984 P.2d 164, 166 (Nev. 1999) ("In exchange for this absolute privilege, comes the requirement and responsibility that the report be fair, accurate, and impartial."). It is well established that an article is not fair and true when it "could reasonably be expected to affect the average reader's appraisal of the story and evaluation of the merits of the charges." *Crane*, 972 F.2d at 1523; *see also Lubin v. Kunin*, 17 P.3d 422, 427 (Nev. 2001) (finding that a one-sided view of a child abuse complaint "went beyond fair, accurate, and impartial reporting"). "Invocation of the [fair reporting] privilege . . . requires the [Court] to determine whether [the statements] were fair, accurate, and impartial." *Lubin*, 17 P.3d at 427.

In this case, the fair reporting privilege does not apply to Mr. McLeod's emails because the article Mr. McLeod forwarded is not a fair, accurate and impartial report about Oracle's claims against Rimini. Rather, this article provides a sensationalized account that does not even mention the words "copyright infringement" with respect to Rimini.[9] SOF 25. In fact, the article makes no mention of *any* Oracle cause of action brought against Rimini. *Id.* Instead, the article regurgitates Oracle's defamatory allegations of "massive theft" and accuses Rimini of "allegedly swiping Oracle software and intellectual property." Dkt. 410, McLeod Decl. ¶ 2 & Dkt. 422, Plt. Ex. 74. As established *supra*, copyright infringement and theft are two disparate causes of action. *See Dowling*, 473 U.S. at 217. The difference between copyright infringement and theft is of a "substantial

[9] The article's only mention of "infringement" occurs in relation to Oracle's suit against SAP, reporting that "Oracle promptly sued SAP for infringing on its business model and other charges." SOF 25.

character," and any article painting Rimini as a thief, rather than as an alleged copyright infringer, is indeed "expected to affect the average reader's appraisal of the story," precluding application of the fair reporting privilege. *Crane*, 972 F.2d at 1523.

E. Rimini Need Not Prove Special Damages on its Defamation Claim.

Finally, Oracle advances arguments that Rimini is required to prove special damages for a trade libel claim. Plt. Br. at 28-29. Rimini, however, is pursuing a claim for defamation, as well as a claim for unfair practices predicated on such defamation. Oracle's allegation that Rimini engaged in "massive theft" is a classic case of defamation *per se* as it tends to impute Rimini's lack of fitness for its business and profession. *Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 213 P.3d 496, 504 (Nev. 2009) ("[I]f the defamatory communication imputes a 'person's lack of fitness for trade, business, or profession,' or tends to injure the plaintiff in his or her business, it is deemed defamation per se and damages are presumed.") (internal citations omitted). As this Court has already found, "an allegation that a party is guilty of a crime is defamatory on its face." Dkt. 111, at 5 (citing *Yow v. Nat'l Enquirer, Inc.*, 550 F. Supp. 2d 1179, 1183 (E.D. Cal. 2008)). As is well established, "a defamation *per se* claim is actionable without proof of special damages." *Yow*, 550 F. Supp. 2d at 1183. Therefore, Rimini is not required to prove special damages because damages are presumed.

VII. CONCLUSION

For the foregoing reasons, Rimini respectfully requests that this Court deny Oracle's Second Motion for Partial Summary Judgment.

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